# THE RECENT CONTROVERSY AS TO THE BRITISH JURISDICTION OVER FOREIGN FISHERMEN MORE THAN THREE MILES FROM SHORE: MORTENSEN V. PETERS

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Emmanuel Mortensen,[1] residing at Grimsby, on the thirtieth of November, 1905, being master of the trawler *Niobe*, of Sandefiord, Norway, was charged, contrary to a bye law adopted pursuant to a British statute, with using the method of fishing, known as otter trawling, in a part of the Moray Firth, five miles or thereabouts by east by north from Lossie-Mouth, which lies within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire and is within the area specified in the bye law referred to, made by the fishery board for Scotland, under a power conferred by statute, which bye law had been duly confirmed by the secretary for Scotland, and duly published. He was thereby liable to a fine not exceeding 100 pounds, on conviction, and, on failure to pay, to not exceeding sixty days imprisonment and to forfeiture of his nets. At the trial, defendant stated, as a preliminary objection, that his steam trawler was registered in Norway, and the *locus* of the offense as alleged was not within the jurisdiction of the court and, reserving this plea, pleaded "not guilty." It was proved said trawler was registered in Sandefiord, Norway, and that defendant was a Dane;

[1] Mortensen v. Peters (High Court of Judiciary, Full Bench). *The Scots Law Times*, vol. xiv, p. 227, August 4, 1906.

that he did the act in the plea alleged, and that this was outside a marine league from low water mark on the adjacent coast, and within ten miles thereof.

The sheriff "repelled" the preliminary objection, found defendant guilty, imposed a fine of fifty pounds, and, in default, sentenced the accused to fifteen days' imprisonment. Defendant paid the fine and appealed, and the questions of law submitted to the high court of justiciary were, whether the sheriff's court had jurisdiction, and whether the conviction and sentence were "legal and competent."

The dean of the faculty (Campell, K. C.) led for appellants. It was argued that the statutes and bye laws in question were capable of conferring jurisdiction over foreign subjects only in British territory; that if a statute expressly applied to foreigners, courts would enforce it, but that legislation was presumed not to conflict with international law. That the decision in the *Franconia* case is still law, except as altered by the act of 1878, and that there was no common law jurisdiction below low water mark, unless in Scotland it extends to the three mile limit.

The lord justice general here referred to the *Franconia* case to show that, as in revenue cases, so in fisheries, a government may have jurisdiction over foreigners without the three mile limit for such special purpose.

Counsel boldly replied: "The right of regulating fisheries is based on no law and has no history. It is not a right of any nation in waters not territorial."

He argued that in the Behring Sea controversy, in 1893, the United States referred to this legislation with reference to herring fisheries as an example of legislating

for foreigners outside the territory. The British case repudiated that construction. That by international law territorial jurisdiction ends at the three mile limit with the exception of bays *intra fauces terræ*. That there is no case holding a bay eighty miles wide *intra fauces terræ*.

That by the North Sea convention the North Sea is defined, so as to include the Moray Firth. That Norway is not a party to that convention but, if the local law is construed to apply to foreigners, it must apply to all, and thus to those foreigners who are within the terms of the convention, and such construction would plainly violate the convention.

That the doctrine of the kings chambers (that all waters within a line from headland to headland are territorial) is wholly discredited, and is maintained by Halleck alone of modern writers.

That in case of great bays held territorial, the courts have so decided on the mixed ground of configuration and history, neither of which supports territorial claims in the Moray Firth.

The solicitor general (Ure, K. C.) led for respondent.

It was argued that the statute and bye law is clear and unambiguous, and applies to British subjects and foreigners alike. That if it were construed to apply to British subjects only, it would fail of its purpose which is to safeguard the line fishermen, and prevent the destruction of spawn, and would merely give foreign fishermen a monoply of fishing in the area designated. Whether the territory is plainly or not subject to British jurisdiction, yet if Parliament provides a regulation for that territory, it applies to *all* persons therein.

The limits of the North Sea in the convention were

solely for the purposes of that convention, and do not affect the law in question. That any water within well defined headlands, and reasonably necessary for the protection of the interest of the adjacent country, may be held territorial. That if, as in Conception Bay, a bay twenty miles wide can be territorial, so may one eighty miles wide. In that connection reference was also made to the case of the *Alleganean*[2] which held the Chesapeake Bay territorial water, and no part of the high seas. That even if the Moray Firth is not territorial, yet police regulations as to fishing may be made as to it. Its long use by line fishermen shows the interest of the adjacent country in such regulations. That Parliament has in other cases legislated for foreigners in extra territorial waters, as in the herring fisheries act of 1808, and the act for policing St. Helena, when Napoleon was a prisoner thereon, and in quarantine acts.

### THE DECISION

The court answered both questions in the affirmative, and dismissed the appeal. The lord justice general in his opinion thought the question one of construction only. That the court had nothing to do with the question whether the legislature had done what foreign powers may consider a usurpation. For the court, an act of Parliament is supreme, and it is bound to give effect to its terms. It can not hold it *ultra vires* if it conflict with international law. The prohibition considered was not general, but against a certain act in a certain place, and so applies to *all* within the limits named.

[2] 4 *Moore's Internat. Arbt.*, p. 4333.

It was with intent to prevent trawling within the space designated, as a protection to fish, and to other means of taking them. To accomplish its purpose, it must apply to all persons, foreign as well as domestic, within that space which is a further reason why it will be so construed without any regard to the expediency of the statute.

That, "It is a trite observation that there is no such thing as a standard in international law, extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of the State which has been adopted and made part of the law of Scotland."

He says there is no definition of what *fauces terræ* are, but:

(1) Scottish institutional writers assert jurisdiction over such water.

(2) The same statutes claim analogous places as territorial.

(3) Many more or less landlocked bays have been held subject to local legislation more than three miles from shore.

That, therefore, it is by no means inconceivable that the British legislature should legislate as to all fisheries in this firth.

That the North Sea convention does not deal with the *mode* of fishing, but only with the exclusion of foreigners, altogether, from fishing in certain localities and, therefore, does not affect this controversy.

Lord Kyllachy concurred, saying "This court is of course not entitled to canvass the power of the legislature to make the enactment."

That while there is a presumption against the legislature exceeding its international rights yet it is only a presumption, and the unambiguous language of this act overrides any presumption, and forbids certain acts in certain waters. This plainly forbids those acts in those waters by any body, and the act applies to foreign as well as to domestic fishermen.

That the purpose was to protect the area in question from a form of fishing deemed injurious, and the act would fail of its purpose, unless it were applied against all fishermen alike, and it certainly was not meant to restrain British trawlers, and leave all others free in these waters, making a hurtful monoploy in favor of foreigners.

That the presumption fails when the area is not clearly exempt, but is debatable ground.

That it is a vain suggestion that any part of the Moray Firth is as free from local control as if in the middle of the German Ocean. It is *prima facie* a bay or firth within well marked headlands, and that there is no arbitrary and artificial rule limiting the width of bays which may be controlled by the adjoining country.

That Lord Blackburn, for the privy council, in the Conception Bay case said: "Jurists were not agreed as to dimensions and configurations which made a bay part of the adjoining territory," and that this is the last deliverance on the subject.

That the convention of 1883 dealt solely with exclusive fishing privileges, and not with protective regulation of fisheries for all alike, and there is nothing therein limiting the right of a nation to regulate fishing within its territory.

That the act in question asserts jurisdiction over the

waters in question for protective purposes, and that is enough for "his majesty's courts."

Lord Johnson said: "Parliament, before and since the union, had been used to regulate fisheries about the coast beyond territorial waters in the narrower sense.

"That the acts, from 1727 to 1882, show the commission were not confined in their control to strictly territorial waters."

Lord Salvesen, newly upon the bench, concurred, and held that the Moray Firth was undoubtedly geographically *inter fauces terræ.*

That the Scotch claimed jurisdiction. That whether other powers concede this, is a matter with which the court has no concern. It is for the foreign office.

That as Norway was no party to the convention, a Norwegian subject can claim no treaty rights thereunder.

The Lord Justice Clerk, Lord M'Laren, Lord Stormouth-Darling, Lord Lowe, Lord Pearson, Lord Ardwall, Lord Dundas and Lord MacKenzie all concurred (July, 19, 1906).

The storm of disapproval which this decision has raised has apparently arisen from the steam trawling interests of Great Britain herself rather than, as might be expected, from the foreign fishing interests. The National Sea Fisheries Protective Association met in conference at Hull, the third port of the kingdom, September 18, bringing together hundreds of delegates representing wide interests, under the presidency of the Right Hon. Lord Heneage. The president, in his opening address, vigorously assailed any regulation of fisheries beyond the three mile limit, as a breach of international law and of the engagements of the nation.

A resolution was moved by Mr. Charles Hellyer of

Hull: "That this conference urges upon H. M. government the great importance to the fishing industry of maintaining the three mile international limits as now defined."

A lively and somewhat acrimonius debate followed, in which it was pointed out that: "It is impossible for a fisherman in the pursuit of his calling to calculate a greater distance than three miles from the land, and seeing that the food fishing machinery of this country is considerably in excess of the remainder of the continental nations, we should have every thing to lose and nothing to gain by the enlargement of the three mile limit." That the action of the fisheries board was based "on erroneous and wicked premises" in the interest of a small section of the fishermen of Scotland. "That they are able to keep back the tide of science and progress, improved machinery and appliances for the catching of fish which can and will supply the need of a great population."

It was urged that the interpretation given in the above case "involves the principle that by virtue of its own legislation a country can extend its jurisdiction indefinitely. If this principle is once admitted it may ultimately lead to the fisheries of Europe being partitioned off among the riparian States of Europe, and to England losing its present supremacy."

That the British steam trawling fleet was more than six times greater than those of all other countries combined.

That the area available for trawling was in general a narrow band immediately outside the present recognized limit of territorial waters.

That a thirteen mile limit (control of which the stat-

ute allowed under certain limitations) would exclude British vessels from nearly one-third of the total area available (except the White Sea), and a nine mile limit would exclude from nearly one-fifth.

The resolution was carried by an overwhelming majority only three hands being raised against it.[3]

The decision was largely discussed in a paper read before the conference of the International Law Association, at Berlin, in October last, on Territorial Jurisdiction in Wide Bays, by Mr. A. H. Charteris, of the Glasgow bar, and Mr. Charteris has communicated an extended note concering the case to the *Juridical Review*, of October 1906, in which he points out that there was no evidence of historical claim of jurisdiction over these waters.

That even the extended range of modern ordinance would give no possible command from the shore over this bay or over its entrance. That these waters were expressly defined to be parts of the high sea and of the German Ocean by the North Sea convention of 1882. That the rule of that convention as to wide bays made them territorial within a line drawn across the bay in the part nearest the entrance at the point where the width does not exceed ten miles and three miles seaward from such line. That this was taken from the Anglo-French fisheries convention of 1839, and was adopted in the legislation of France in 1888, as to French and Algerian waters, by Belgium in 1891, by Dutch law in 1889, and was much earlier applied by the German Empire; and nearly the same rule (bays of twelve miles in width are included) was adopted by Spain in 1885, in her convention with Portugal. That Norway, by

[3] See *Fish Trades Gazette*, September 29, 1906, p. 84 to 88, for a copy of which the writer is indebted to the courtesy of Lord Heneage.

legislation of 1889, draws the line as to jurisdiction over fisheries between her islands lying off the mainland a little over twenty miles apart. That Russia, by her admiralty instructions of 1893, claimed as Russian waters, at least for war and neutrality, the White Sea, and as its entrance is sixty miles wide, this approaches most nearly to the claim as to the Moray Firth. He shows the Scotch judges had in earlier cases described this firth as extending "much beyond what can properly be called a firth," and including "part of the ocean,"[4] and "a part of the sea of vast extent and extending far out into the practically open sea for a considerable number of miles."[5] That Lord Kyllachy, in 1899, held the same bye law in extra-territorial waters ineffectual,[6] and two Irish judges, O'Brien, C. J., and Andrews, J., seem to have conceded that an Irish bye law as to fisheries ought not to be construed to apply to foreigners outside the three mile limit.[7]

The writer is informed by private letter from Scotland that it is only very recently that the Scotch law officers of the crown took the view that prohibition of the statute in question was applicable to foreigners and it is matter of private gossip that the lord president, Lord Dunedin, who gave the leading judgment in the case, while lord advocate for Scotland was strongly of the opinion that a prosecution against foreigners was incompetent.

The Right Hon. Lord Heneage advises the author that the British foreign office has decided to prepare a case for the consideration of the law officer of the crown involv-

[4] Green v. Leith (1896) 23 R. (J.C.) 50.
[5] Wilson v. Rust (Ibid., p., 56).
[6] Poll v. The Lord Advocate (1897) 1 F. 823.
[7] Rex (Coleman) v. Petit (1902) 2 Ir. R. I.

ing the points decided. The writer is informed by letter of November 14, from the foreign office, that no information can at present be given out upon the subject. Denmark has taken the very correct view, as is intimated to the writer by her foreign office, that the master who was interfered with, though a Dane, was on a Norwegian vessel and, therefore, Denmark had no occasion to express any opinion in the matter as he was not under Danish law.

The *Law Magazine and Review*, which is in especially close relations with the International Law Association, in the number for November (p. 97), points out the inconsistency of the decision we are considering with the attitude of Great Britain as to the Behring Sea controversy, and says: "The Moray Firth is far too open a gulf to be properly annexed by the owners of its shore." It suggests that "Norway (to which country the ship in the present case belonged) is for reasons of her own not unwilling to acquiesce in wide claims over territorial waters."

The writer would add that he applied to the foreign office of Norway for information as to the attitude of Norway on the matter, but that office, too, had nothing to give out.

The decision turns upon two main propositions, more or less clearly laid down of general interest, and one more local in its scope.

*First:* That, if an act of Parliament, fairly interpreted, asserts jurisdiction in a certain place, it is binding on the court, whether or no it violates international law, and the rights of foreign nations; and that, fairly interpreted, the act considered does assert jurisdiction over the waters in question, and the acts of foreigners therein.

*Second:* That there is, in international law, no limit to

the width of bays which may be treated as territorial by the adjoining State, and that hence there is no conflict between the regulation in question and international law.

*Third:* That the North Sea convention does not limit the right of Great Britain to regulate fishing for all alike beyond the three mile limit, but merely prevents her excluding fishermen of certain nations of which Norway was not one.

Space permits the discussion only of the first two points.

As to the first proposition, notwithstanding some inconsistent language in earlier decisions, it yet seems accepted beyond question by the courts of England and the United States. A statute can change the common law of nations for all who are bound by the statute, just as much as the common law of the land; and the courts of the nation enacting it, are among those so bound.

In *ex parte* Cooper,[8] the Supreme Court of the United States refused a writ of prohibition to the United States district court for the district of Alaska, to restrain a decree of forfeiture against a British vessel for taking seals about fifty-nine miles from land in Behring Sea, contrary to a United States statute.

The court holds the seizure was made under the claim by the government of jurisdiction over the waters in question. That it was conceded that a joint action of congress and the executive would bind the courts as to such jurisdiction. That there was no such conjoint determination, and, therefore, the court must determine it.

But the court holds that it is contrary to settled law for the courts to undertake to decide whether the government is right or wrong in its jurisdiction claim (relying

[8] 143 U. S. 474.

upon five United States cases and three English decisions).[9]

One of the cases relied on is Jones v. United States,[10] where the jurisdiction of the United States over Navassa Island in the Caribbean Sea was proclaimed by the president pursuant to a statute providing therefor. The court says "who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances (citing nine United States decisions), and adding: "It is equally well settled in England" (citing five English decisions).[11]

It must be conceded then that the Scottish decision is, on the first ground, fully sustained by the settled law of both England and the United States.

But, while the propriety of the court's submission to the statute of its own country must be fully admitted, the doctrine laid down by the Supreme Court of the United States, in 1808, is believed still to be law. "That whatever may be the municipal law under which a tribunal acts, if it exercise a jurisdiction which its sovereign is not allowed by the law of nations to confer, its decrees must be disregarded, out of the dominions of its sovereign."[12]

[9] Foster v. Neilson, 2 Peters 253; Williams v. Insurance Co., 3 Sum. 270, 13 Pet. 415; Luther v. Borden, 7 How 1; Georgia v. Stanton, 6 Wall 50; Jones v. U. S. 137 U. S. 202; Nabob of Carnatic v. East India Co., 1 Ves. Jr. 371, 2 Ves. Jr. 56; Barclay v. Russell, 3 Ves. Jr. 424; Penn. v. Baltimore, 1 Ves. Sr. 144.

[10] 137 U. S. 202.

[11] Moore's *Digest International Law*, i, 744–5

[12] Rose v. Himely, 4 Cranch 241; Moore's *Digest International Law*, ii, §198.

AS TO THE SECOND GROUND

Local jurisdiction appears to have been established by judicial decision in four bays or arms of the sea of extraordinary width, upon the ground that such waters are peculiarly surrounded by the territory of the nation claiming jurisdiction, and that authority has been so exercised and conceded for a length of time.

The Bristol Channel, an arm of the sea dividing England from Wales and about eighty miles long by from five to forty-five miles wide, was, in 1859, held British territory, in a prosecution against one claiming to be an American citizen for a felony on an American vessel in those waters.[13]

Conception Bay lies in the eastern side of New Foundland, between well marked headlands called Cape St. Francis and Split Point. It is forty to fifty miles long, and of an average width of fifteen miles but is over twenty miles wide at the mouth. In a contest between marine telegraph companies, the privy council, in 1877, held that the bay was part of the territorial waters of New Foundland, Lord Blackburn giving the judgment, and holding that while there was agreement that landlocked bays "belonged to the territory of the nation which possesses the shores round them, yet, there was no agreement as to what is a bay for this purpose," or what are the "dimensions or configuration" which make a bay territorial. That it is not necessary to lay down a rule since Great Britain has exercised dominion for a long time over this bay with the acquiescence of other nations, and that it has by act of Parliament been made a part of the British

[13] Reg. v. Cunningham, Bells C. C. 722, 1 Moore's *Digest International Law*, p. 739.

territory, which last fact is conclusive on a British tribunal.[14]

In 1885, the court of commissioners, for the *Alabama* claims, held that a ship destroyed by Confederate forces while at anchor in Chesapeake Bay, more than four miles from shore, was not destroyed on the high seas, within the meaning of the act under which judgment was claimed. The commissioners held that though the bay is twelve miles wide at its mouth, and some two hundred miles in length, it is wholly a part of the territorial waters of the United States. This was held on the authority of the preceding cases, the fact that it is landlocked by United States territory, and had been assumed to be United States territory in acts of congress, establishing revenue districts.[15]

In 1890, the Supreme Court of Massachusetts decided the case of Commonwealth v. Manchester,[16] and this was affirmed by the Supreme Court of the United States, in 1891, in Manchester v. Massachusetts.[17] This was a prosecution for illegal fishing in Buzzards Bay by means of a purse seine. The court in the final decision held that "in the Queen v. Keyn, wherever the question of the right of fishery is referred to, it is conceded that the control of fisheries, to the extent of at least a marine league from the shore belongs to the nation on whose coast the fisheries are prosecuted." It quotes with approval the decision as to Conception Bay, and holds: "We think it must be regarded as established that, as between nations,

[14] The Direct U. S. Cable Co. v. The Anglo Am. Tel. Co. Law Rpts. 2 App. Cases 394. *Snow's Cases Inter. L.*, p. 45.

[15] The *Alleganean* (Stetson v. U. S.) 32 *Albany L. J.* 484. 4 Moore's *Internat. Arbt.* 4333, 5 *id.*, 4675. *Scott's Cases Internat. Law*, p. 143.

[16] 152 Mass. 230.

[17] Manchester v. Massachusetts. 139 U. S. 240.

the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or embedded in the soil."

In the case concerning the Chesapeake Bay, *supra*, the commissioners gave much weight to the case of the brig *Grange*, a British ship, which in 1793 was captured by a French privateer in Delaware Bay, which is thirteen miles wide at its mouth, and twenty-five miles at its widest. Great Britain demanded that the United States compel France to restore the ship, on the ground that the capture was within the neutral territory of the United States. Mr. Randolph, attorney general, gave his opinion that the whole of Delaware Bay was such territory, and Mr. Jefferson accordingly demanded, and France conceded, the return of the vessel. This was not a judicial decision, but was an important holding in which three great nations agreed that a great bay was territorial without regard to the three mile limit.[18]

On the other hand, the Bay of Fundy, extending 130 to 140 miles inland, with a width of 65 to 75 miles, was held an open arm of the sea by Mr. Joshua Bates, umpire, in 1853,[19] and this was cited in the Behring Sea matter, as part of the case of Great Britain.[20]

Mr. Bates holds "the word bay as applied to this great body of water, has the same meaning as that applied to

[18] See 1 Ops. Atty. Genl. 15; 1 Moore's *Digest Internat. Law*, p. 735.

[19] R. Com. of Claims, p. 170. Cited *Scott's Cases International Law*, p. 153.

[20] Senate Exec. Doc., 2d Ses., 53d Congress, 1893–4, vol. 7, part 4, p. 110.

the Bay of Biscay and the Bay of Bengal, over which no nation can have the right to assume sovereignty."

It will be observed that the Bay of Fundy and the Moray Firth are of nearly the same width, the latter being a little the wider, and an inspection of the maps will show that the Moray Firth is much less landlocked, and much more open to sea. However one of the headlands of the Bay of Fundy is in the United States, and one in British territory, and access to parts of both countries is had through its water, and these facts had weight with Mr. Bates.

The Bay of Cancale, seventeen miles in width, is claimed also as territorial.[21]

There seems little in any of these cases to support the assumption of local jurisdiction in a much wider, far less landlocked bay or gulf which has been always regarded apparently, even by the Scotch courts themselves, as a part of the ocean or high seas. It is certainly a great extension of the doctrine and seems at least to presage the revival of the doctrine of the kings chambers, before alluded to.

England's great writer on international law, Sir Robert Phillimore, collects the authorities to show that the jurisdiction over bays is limited to such as the adjoining country has something like physical command of. He quotes Vattel to the effect that the doctrine does not apply to "*ces grands espaces de mer auxquels on donne quelquefois ces noms, tels que la baie de Hudson, le détroit*

[21] Glenn: *International Law*, p. 60. Lake Borgne and Mississippi Sound, large lagoons or bays of salt water, connected with the Gulf of Mexico but landlocked, seem to be held territorial in a recent decision of the United States Supreme Court, which is by no means easily understood. Louisiana v. Mississippi, 26 Sup. Ct. R. 408 (1905). The fact that the openings into the Gulf of Mexico "are neither of them six miles wide," seems relied on. See p. 421.

*de Magellan, sur lesquels l'empire ne saurait s'éntendre, et moins encore la propriété."*

The claim made in argument that the doctrine of the exclusive territorial jurisdiction of the British crown over the so-called kings chambers is maintained by Halleck alone among modern writers, seems hardly warranted.

Phillimore, in his commentaries, first published in 1854, republished in 1874 says: "Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of sea cut off by lines drawn from one promontory to another, and called the kings chamber.[22]

The same doctrine is fully set out by Wheaton;[23] and in the fourth English edition by J. B. Atlay (1904), there is no intimation that the doctrine is obsolete or abandoned, though Hall treats it as obsolete[24].

If the waters in question are not territorial by reason of their situation within the shelter of enclosing lands, it is certainly difficult to support the claim of England to jurisdiction over a foreign vessel in them, even upon her own precedents.

Queen Elizabeth complained in a letter she wrote to the king of Denmark of the manner in which British vessels were prevented from fishing in the North Sea by Denmark claiming that it was free, *Jure gentium omniumque nationium morbius."*[25]

When, in 1602, Elizabeth sent a special embassy to Denmark, she instructed her ambassador to "declare that the laws of nations alloweth of fishing in the sea

[22] I Phillimore, p. 239. See to like effect 1 Halleck *Inter. Law*, p. 139, ed. 1878.

[23] Chapter iv, §179.

[24] P. 159, ed. 1904.

[25] I Phillimore, p. 216.

everywhere," and further "that though property of sea in some small distance from the coast, maie yield some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is well seen in our seas of England and Ireland, and in the Adriatic Sea of the Venetians."[26]

Denmark's pretensions in modern times were limited to excluding foreigners from fishing within fifteen miles of Iceland and also of Greenland.

England and Holland strictly denied the validity of these prohibitions and adhered "to the usual limit of a cannon shot from the shore."

In 1790, Spain claimed the exclusive right of navigation and fisheries in Nootka sound, and seized British vessels therein, and complained of fisheries carried on by his majesty's subjects in the seas adjoining to the Spanish continent as contrary to the rights of the crown of Spain.

England asserted her full rights and demanded adequate satisfaction, and the matter was settled by convention.[27]

Spain has repeatedly claimed maritime jurisdiction over littoral waters to the extent of two leagues or six nautical miles from her coast but England and the United States have consistently refused to accede to this pretension. So, in 1874, Lord Derby intimated to the Spanish government that its pretensions would not be submitted to by Great Britain, and that any attempt to carry them out would lead to very serious consequences.[28]

The *Digest of International Law*, published by the government of the United States, in 1906, and very ably

[26] I Phillimore, p. 226–7.

[27] I Phillimore, p. 213, *et seq.*

[28] Wheaton's *International Law*, 4th Eng. ed., 1904, p. 277. Lord Derby to Mr. Watson, 25th Dec., 1874, U. S. Dip. Cor., 1875, p. 641. Same, p. 649. Wharton's *Dig.*, §32.

edited by Hon. John Bassett Moore[29] collects the authorities upon the subject of littoral jurisdiction. It shows that the doctrine of jurisdiction over waters within lines from headland to headland, somewhat favored by Kent, was opposed by Woolsey, as "out of character for a nation that has ever asserted the freedom of doubtful waters as well as contrary to the spirit of more recent times." It shows that the position of the United States, from 1793 down to the present time, has been that it would claim jurisdiction for three miles from its coast only, and it would concede the same and no more to other maritime nations. It fully supports this by the opinions, at first it is true somewhat doubtful, of Mr. Jefferson, Mr. Hamilton, Mr. Pickering, Mr. Madison, Mr. Buchanan, Mr. Seward and Mr. Fish, secretaries of state or of the treasury.

In 1862, Mr. Seward, by instruction of the president, wrote the Spanish minister, that the United States is not prepared to admit that Spain "can exercise exclusive sovereignty upon the open sea beyond a line of three miles from the coast," and in 1863, that it can not be admitted "that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. His right to a jurisdiction of three miles is derived not from his own decree but from the law of nations."

Great Britain, in her Behring Sea case, quoted at some length, this very communication denying the claim of Spain, and said the "position was correctly taken by the United States."[30]

In 1875, Mr. Fish informed Sir Edward Thornton,

[29] Vol. i, p. 698, *et seq.*

[30] Case of Great Britain. Sen. Ex. Doc., 2d Ses., 53d Cong., vol. 7, part 4, p. 108.

British minister, that every administration of this country which had considered the subject had objected to the claim of Spain to a six mile limit on the same grounds as had the Earl of Derby.

In the same year, Mr. Fish objected to powerful nations regarding seas and bays, usually of large extent near their coast, as closed to any foreign commerce or fishery not specially licensed by them, saying, that such claim was "without exception a pretension of the past and that no nation could claim exemption from the general rule of public law which limits its maritime jurisdiction to a marine league from its coast."[31]

In 1880, Mr. Evarts, in instructions to Mr. Fairchild, minister to Spain, said: "This government must adhere to the three mile limit rule as the jurisdiction limit."

It will be seen that the rule as to fisheries does not appear to differ from that as to general jurisdiction and Mr. Moore says: "No general disposition has been manifested in recent years to restrict the right of nations to take fish in the open sea." He shows that the three mile limit has been adopted as to exclusive fishing rights in conventions between the United States and Great Britain and between Belgium, Denmark, France, Germany, and Great Britain.[32]

In 1884, Mr. John Davis, assistant secretary of state, wrote Mr. Osborn in respect to the whale fisheries off Bahia Bay: "The general law and rule is understood by this government to be that beyond the marine league or three mile limit, all persons may freely catch whale or fish." In computing this limit, however, bays "are not

[31] This is quoted in the case of Great Britain as to Seal Fishing. Senate, Exec. Doc., 2d Ses. 53d Cong., vol. 7, part 41, p. 111.

[32] 1 Moore's *Digest Internat. Law*, p. 716.

taken as a part of the high seas; the three mile must be taken outside of a line drawn from headland to headland."[33]

This improvident admission by an assistant secretary, in 1884, is met by the later declaration of a secretary of state. Mr. Bayard in a communication to the secretary of the treasury, in 1886,[34] reviews the whole subject, collects the rulings of successive secretaries of state, and the opinions of learned writers, limits all jurisdictional right to the three mile zone, and says: "The headland theory, as it is called, has been uniformly rejected by our government," and asserts that the rights of American fishermen on the Canadian coast are no further limited.

In 1896, Mr. Olney, secretary of state, in a letter to the Dutch minister concerning a proposed treaty to settle the extent of territorial jurisdiction over maritime waters, said: "I need scarcely observe to you that an extension of the headland doctrine, by making territorial, all bays situated within promontories twelve miles apart, instead of six, would affect bodies of water now deemed to be high seas, and whose use is the subject of existing conventional stipulations."[35]

The Behring Sea arbitral tribunal held that the United States had no right to control foreign vessels for any purpose, even for the protection of seals, beyond the ordinary three mile limit, but M. de Courcel has stated that the parties admitted that the three mile limit was the ordinary limit of territorial waters, and the learned editor of Hall (edition 1904)[36] thinks that decision does not

[33] 1 Moore's *Digest Internat. Law* (1906), p. 718.
[34] *Idem*, p. 718.
[35] *Idem*, p. 735.
[36] P. 155.

affect the question of the legality of claims beyond that distance.

However, that decision did hold that the United States had no right to regulate the manner of taking seal, or prescribe a close season, or forbid (as to foreigners) the seal fisheries beyond three miles from shore. This was held, notwithstanding an extensive showing of the interest of the United States in such fisheries, and the great necessity of such regulation to prevent the extinction of a useful industry.[37]

It would seem, therefore, an important authority against any nation's right to regulate fisheries (as to foreigners) beyond its own territory, however large its interests or much needed the regulations, and the ruling obtained was upon the claim and contention of Great Britain herself as to waters more or less enclosed by our territory.

Although in the Behring Sea the United States claimed jurisdiction on special grounds, yet from the beginning having for more than a century very firmly limited her own claims of general littoral jurisdiction to the three mile limit, and as firmly refused to accede to any more extended claim by any other nation, she, upon her special claim being disallowed, instantly limited her exercise of jurisdiction in these waters to three miles from low water mark. So the federal court of appeal decided in 1896 that the waters of Behring Sea, more than one league from American shore, were not Alaskan territory after the arbitral award and, therefore, that the statute of the United States for the protection of certain fur bearing animals therein did not apply.[38]

[37] See Award of Tribunal. Sen. Ex. Doc., 2d Ses., 53d Cong. 1893–4, vol. 7, part 1, p. 75, *et seq.*

[38] *La Ninja*, 75 Fed. 513. *Scott's Cases Internat. Law*, p. 443.

Perhaps the most intelligent general discussion of the rights of a nation over the littoral sea that can be referred to is found in Hall's *International Law,*[39], and the text with the notes in the edition of 1904 is sufficiently modern. He shows the various claims of continental nations, and that a State must be supposed to accept the three mile limit as defining its marginal waters "in the absence of express notice that a larger extent is claimed." The notes show an increasing belief that the three mile limit is insufficient for "the safety of the territory," and "that it is desirable for a State to have control over a larger space of water for the purpose of regulating and preserving the fisheries in it, the productiveness of sea fisheries being seriously threatened by the destructive methods of fishing which are commonly employed."

The *Institut de Droit International,* after a very careful study and report by a committee and exhaustive discussion in 1894, resolved that a zone of six marine miles from low water mark ought to be considered territorial for all purposes.

As to the claim of jurisdiction beyond the three mile limit (except as it is justified by the place being within a landlocked bay) while the older demand of England was to exercise almost unmeasured right of interference with the ships of other nations upon the high seas, and especially in the narrow seas, and waters convenient to her coast, yet, after the war of 1812, this was wholly abandoned. In 1817, Sir William Scott, her greatest authority in maritime and international law, in a judgment of the high court of admiralty, used this language: "In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and

[39] P. 152, *et seq.*

independence, no one State or any one of its subjects, has a right to assume or exercise authority over the subjects of another," and therefore, he held, a British naval officer had no right to board a French ship on the high seas for the purpose of enforcing either an English or French law against the slave trade.[40]

This case was cited at some length on this point in the case of Great Britain as to the right of the United States to control the seal fisheries in Behring Sea more than three miles from shore.[41]

In the celebrated case of the Queen v. Keyn[42] the court of crown cases reserved, in 1876, by a closely divided court, distinctly held that England had no jurisdiction over a foreigner on a foreign ship in her littoral waters for a criminal act, but at the same time, the chief justice intimated, that if England should by legislation, appropriate to her own jurisdiction, such waters "such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country, leaving the question of its consistency with international law to be determined between the governments of the respective nations." He holds, further that all usage as to control of such waters is connected with "navigation or with revenue, local fisheries or neutrality." The claim of jurisdiction over the three mile limit was at once made by act of parliament of 1878, to offset the decision last considered. Nevertheless the doctrine of that case was considered to be the final one as to English adjudications, as intimated by the British board of trade in a communication procured for the writer in 1903, and on the writer

[40] LeLouis, 2 Dodson 210. *Scott's Cases,* p. 357.
[41] Senate Ex. Doc., 2d Ses., 53d Congress, 1893–4, vol. 7, part 4, p. 117.
[42] L. R. 2 Exec. Div. 63. *Scott's Cases,* 154.

quoting such communication at Antwerp before the International Law Society, in the same year, it was loudly cheered by eminent English judges then present.

This statute however claimed what all the world except her own judges conceded to England, and therefore conflicted with no international right.

Her later statutes, assuming to give her various boards or departments the right to regulate fisheries beyond the three mile limit have not met uniform interpretation at home. This is fully shown by the citations already given. In addition, I refer to the *Law Times* of London, for November 30, 1901 (p. 99), which contains the following: "The appeal to the privy council of the Dublin Steam Trawling Company against a proposed bye law of the department of agriculture which would prohibit steam trawling off the coast of Counties Dublin and Wicklow for a distance, in some places, of thirteen miles from low water mark, was heard by the judicial committee on the 22d inst. The lord chancellor, in announcing that the committee had decided to report against the sanctioning of the bye law, gave no reasons; it is impossible to think that the argument that was addressed to the committee, that the bye law would be a breach of international law, and that it was unauthorized either by the common or statute law, did not weigh with the judges. The decision of course of the kings bench division, in *Rex* (Coleman) v. Petit (1 N. I. J. R. 213) in which it was decided that a similar bye law in Co. Waterford was *intra vires*, at least so far as regards British subjects, was not binding on the committee, especially as the court was not in that case unanimous."

Of course as to British subjects on the high seas their own country can legislate and thereby violate no international right.

The decision by the judicial committee of the privy council in a matter within its discretion refusing approval to a bye law of the above character must carry great weight as to the standing of such a regulation in international law. It is a most important intimation from a very high British tribunal, that it is regarded as a trespass upon the common right unwarranted by international law.

In conclusion, itwould seem that the acquiescence of the Scottish court in the jurisdictional claim made under the authority of an act of Parliament, was in accord with the settled law and practice of England and the United States.

That in exercising the right to control fisheries in an open gulf eighty miles wide, including 2000 square miles of water, Great Britain is greatly exceeding claims heretofore sustained as to landlocked bays.

That such claims being established upon the coast of Scotland would tend to establish a like right of control upon the coast of British America which would conflict with the interests and immemorial claim of the United States.

That the claim of jurisdiction beyond three miles upon substantially an open coast for purposes of regulation of fisheries seems to have little support and to be greatly discredited by the Behring Sea contention and award, and finally, to quote the words of Mr. Hannis Taylor, that: "The postulate is fundamental that jurisdiction and territory are co-extensive."[43] And that no right to regulate what belongs to all nations can be conceded to one nation, however large her interest or enlightened her councils.

The principle of the regulation, if generally applied, would make all indentations in the coast, however wide

[43] *International Law*, p. 147.

and however open, capable of appropriation by the adjoining countries and the present limitation of littoral dominion to three miles from shore, would apply solely at the extreme headlands. The fishing grounds of the world would substantially all pass into local control, a circumstance which would tend greatly to limit the freedom of the seas which ever since the voice of Grotius was lifted in its defense has grown and ought to grow. If acquiesced in for the purpose of a beneficial restriction, the local claim is obviously apt to become the basis of complete dominion over the waters in question and all in like place. This is well illustrated by the fact that in the case mainly considered here Lord Kyllachy discussed the bye law in question as "the right of a nation to regulate fishing within its territory." The principal of that case seems to threaten the freedom of the Bay of Biscay and the Bay of Bengal.